

A Tan Sri Abdul Khalid Ibrahim v Bank Islam (M) Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO
W-02(IM)-3019-12 OF 2011

B LOW HOP BING, ZAHARAH IBRAHIM AND AZIAH ALI JJCA
14 MAY 2012

C *Constitutional Law — Legislation — Constitutionality of sections in statute —*
Whether ss 56 and 57 of the Central Bank of Malaysia Act 2009 unconstitutional
— Whether requirement that court must refer Shariah questions concerning Islamic
financial matters to Shariah Advisory Council for ruling and be bound by ruling
usurpatory of court's functions — Whether ss 56 and 57 discriminatory and
D *contravened art 8 of the Federal Constitution — Whether both sections had*
retrospective effect

The appellant ('Khalid') and the respondent ('Bank Islam') had separately sued
each other over the grant by Bank Islam to Khalid of an Islamic financing
facility ('the facility'). Khalid sought to declare the facility and the agreements
executed in connection with it as invalid and in contravention of the Islamic
Banking Act 1983 ('IBA') while Bank Islam's suit was to recover from Khalid
the monies he owed under the facility. After both suits were consolidated Bank
Islam applied to the High Court to refer certain Shariah questions arising in the
suits to Bank Negara's Shariah Advisory Council ('SAC') for its ruling pursuant
to s 56 of the Central Bank of Malaysia Act 2009 ('the Act'). Section 56, inter
alia, mandatorily required any Shariah question arising in proceedings relating
to Islamic financial business before any court or arbitrator to be referred to the
SAC for a ruling. Such ruling was binding on the court or arbitrator under s 57
of the Act. The High Court granted the application and referred certain
questions to the SAC for its ruling prompting Khalid to file the instant appeal
to the Court of Appeal. He contended that (i) ss 56 and 57 were
unconstitutional for being in contravention of Part IX and arts 8 and 74 of the
Federal Constitution ('Constitution') (ii) the SAC usurped the functions of the
courts in ascertaining issues pertaining to Islamic law and (iii) the High Court
erred in holding ss 56 and 57 had retrospective effect.

Held, dismissing the appeal with costs:

I (1) Sections 56 and 57 were valid and constitutional. They were within
Parliament's power to enact. Article 74(1) of the Constitution
empowered Parliament to make laws with respect to any of the matters
enumerated in the Federal List (List 1) or the Concurrent List (List 3) of
the Ninth Schedule of the Constitution. Item 4(k) of List 1 empowered
Parliament to make laws in respect of civil and criminal law and

- procedure and the administration of justice including the ascertainment of Islamic law and other personal laws for purposes of federal law. Banking was a matter within the Federal List and the Islamic Banking Act 1983 and the Act were clearly federal laws (see paras 20 & 21). A
- (2) Sections 56 and 57 were applicable without discrimination to all parties who were in the same circumstances and so it could not be said that they contravened art 8 of the Constitution (see para 22). B
- (3) The judicial functions of the court were not usurped by the SAC. The fact that the court was bound by the SAC's ruling under s 57 did not detract from the judicial functions and duties of the court in providing a resolution to the dispute between the parties. In applying the SAC ruling to the particular facts of the case before the court, the judicial functions of the court to hear and determine a dispute remained inviolate. The SAC, like any other expert, did not perform any judicial function in the determination of the ultimate outcome of the litigation before the court (see para 25). C D
- (4) The High Court was correct in holding ss 56 and 57 had retrospective effect. Khalid was not deprived of his pre-existing rights. Under the previous Central Bank of Malaysia Act of 1958 the SAC's statutory duties and powers to rule on Shariah questions referred to it in connection with Islamic financial matters or business already existed. Under the 1958 Act the court had discretionary power to refer such questions to the SAC whereas under the 2009 Act the reference was made mandatory (see paras 26–29). E F

[Bahasa Malaysia summary]

Perayu ('Khalid') dan responden ('Bank Islam') telah secara berasingan menyaman satu sama lain ke atas pemberian oleh Bank Islam kepada Khalid kemudahan kewangan Islam ('kemudahan'). Khalid memohon untuk mengisytiharkan kemudahan dan perjanjian-perjanjian yang dilaksanakan berhubung dengannya adalah tak sah dan bertentangan Akta Perbankan Islam 1983 ('API') sementara guaman Bank Islam adalah untuk mendapatkan kembali daripada Khalid wang yang dihutang olehnya di bawah kemudahan tersebut. Selepas kedua-dua guaman digabungkan Bank Islam memohon kepada Mahkamah Tinggi untuk merujuk soalan-soalan Syariah tertentu yang berbangkit di dalam guaman-guaman tersebut kepada Majlis Penasihat Syariah Bank Negara ('SAC') untuk perintahnya berikutan s 56 Akta Bank Negara Malaysia 2009 ('Akta'). Seksyen 56, antara lain, secara mandatori mengkehendaki apa-apa soalan Syariah dalam prosiding berkaitan perniagaan kewangan Islam di hadapan mana-mana mahkamah atau penimbang tara untuk merujuk kepada SAC untuk perintah. Perintah sedemikian mengikat mahkamah atau penimbang tara di bawah s 57 Akta. Mahkamah Tinggi membenarkan permohonan dan merujuk soalan-soalan tertentu kepada SAC G H I

- A untuk perintahnya menyebabkan Khalid memfailkan rayuan ini ke Mahkamah Rayuan. Perayu berhujah bahawa (i) ss 56 dan 57 tidak berpelembagaan kerana bertentangan Bahagian IX dan perkara-perkara 8 dan 74 Perlembagaan Persekutuan ('Perlembagaan') (ii) SAC mengambil alih fungsi-fungsi mahkamah dalam memastikan isu-isu berkaitan undang-undang Islam dan (iii) Mahkamah Tinggi tersilap dalam memutuskan ss 56 dan 57 mempunyai kesan retrospektif.

Diputuskan, menolak rayuan dengan kos:

- C (1) Seksyen 56 dan 57 adalah sah dan berperlembagaan. Ia dalam kuasa Parlimen untuk menggubal. Perkara 74(1) Perlembagaan memberi kuasa kepada Parlimen untuk menggubal undang-undang berkaitan apa-apa perkara yang disebut di dalam Senarai Persekutuan (Senarai 1) atau Senarai Semasa (Senarai 3) Jadual Kesembilan Persekutuan. Item 4(k)
- D Senarai 1 memberi kuasa kepada Parlimen untuk menggubal undang-undang berkaitan undang-undang sivil dan jenayah dan pentadbiran keadilan termasuk memastikan undang-undang Islam dan undang-undang persendirian lain untuk tujuan undang-undang persekutuan. Perbankan adalah perkara dalam Senarai Persekutuan dan API dan Akta tersebut adalah jelas undang-undang persekutuan (lihat perenggan 20 & 21).
- E (2) Seksyen 56 dan 57 terpakai tanpa diskriminasi kepada kesemua pihak yang berada dalam keadaan yang sama dan oleh itu ia tidak dapat menyatakan bahawa ia bertentangan perkara 8 Perlembagaan (lihat perenggan 22).
- F (3) Fungsi-fungsi mahkamah tidak diambil alih oleh SAC. Fakta bahawa mahkamah adalah terikat dengan perintah SAC di bawah s 57 tidak dikurangkan daripada fungsi-fungsi kehakiman dan tugas-tugas mahkamah dalam memperuntukkan resolusi kepada pertikaian di antara pihak-pihak. Dalam menggunakan perintah SAC kepada fakta tertentu kes di hadapan mahkamah, fungsi-fungsi mahkamah untuk mendengar dan menentukan pertikaian kekal tidak dicabuli. SAC, seperti pakar yang lain, tidak menjalankan apa-apa fungsi kehakiman dalam menentukan keputusan terakhir litigasi di hadapan mahkamah (lihat perenggan 25).
- G (4) Mahkamah Tinggi adalah betul dalam memutuskan ss 56 dan 57 mempunyai kesan retrospektif. Khalid tidak dinafikan hak-hak sedia adanya. Di bawah Akta Bank Negara 1958 yang sebelumnya tugas-tugas statutori SAC dan kuasa untuk memerintah atas soalan-soalan Syariah dirujuk kepadanya berhubung dengan perkara kewangan Islam atau perniagaan yang telah wujud. Di bawah Akta 1958 mahkamah mempunyai kuasa budi bicara untuk merujuk soalan-soalan sedemikian kepada SAC sebaliknya di bawah Akta 2009 rujukan dibuat sebagai mandatori (lihat perenggan 26–29).]
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Cases referred to

Dato' Hari Menon @ Dato' T Puraharan all CP Ramakrishnan (Suing as Legal Representative of DYMM Tuanku Jaafar Ibni Almarhum Tuanku Abdul Rahman, Yang DiPertuan Besar Negeri Sembilan Darul Khusus) v Texas Encore LLC & Ors [2005] 4 MLJ 506, HC (folld)

Dato' Menteri Othman bin Baginda & Anor v Dato' Ombi Syed Alwi bin Syed Idrus [1981] 1 MLJ 29, FC (folld)

Faridah Begum bte Abdullah v Sultan Haji Ahmad Shah Al Mustain Billah Ibni Almarhum Sultan Abu Bakar Ri'ayatuddin Al Mu'adzam Shah [1996] 1 MLJ 617 (folld)

Mohd Alias bin Ibrahim v RHB Bank Bhd & Anor [2011] 3 MLJ 26, HC (refd)
Pantai Bayu Emas Sdn Bhd & Ors v Southern Bank Bhd [2008] 6 MLJ 649, AC (refd)

PP v Mohd Noor bin Jaafar [2005] 6 MLJ 745, HC (folld)

Sukma Darmawan Sasmitat Madja v Ketua Pengarah Penjara Malaysia & Anor [1999] 1 MLJ 266, CA (folld)

Tan Sri Abdul Khalid bin Ibrahim v Bank Islam (M) Bhd and another suit [2009] 6 MLJ 416, HC (refd)

Legislation referred to

Central Bank of Malaysia Act 1958 (repealed by the Central Bank of Malaysia Act 2009) s 16B

Central Bank of Malaysia Act 2009 ss 56, 57

Courts of Judicature Act 1964 s 84

Federal Constitution arts 8, 74, 74(1), 121(1) part IX, Ninth Schedule, List 1, Item 4(k), List 3

Islamic Banking Act 1983 s 3

Appeal from: Civil Suit No D4–224–216 of 2007 (High Court, Kuala Lumpur)

Malik Imtiaz Sarwar (Asma Mohd Yunus and Azinuddin Karim with him) (Thomas Philip) for the appellant.

Tommy Thomas (with him Ganesan Nethi) (Tommy Thomas) for the respondent.

Low Hop Bing JCA (delivering judgment of the court):**APPEAL**

[1] The appellant/plaintiff ('Khalid') has brought this appeal against the decision of Zawawi Salleh J in allowing the respondent/defendant's ('Bank Islam's') application in encl 59 ('the application') to refer Shariah questions to Bank Negara's Shariah Advisory Council ('SAC') for its ruling pursuant to s 56 of the Central Bank of Malaysia Act 2009 ('the Act').

(A reference hereinafter to a section is a reference to that section in the Act).

A [2] We have been informed by learned counsel that on the issues raised in this appeal, so far there has been no reported judgment by the Court of Appeal. We now set out our view on the new vista ventilated in this appeal which we dismissed on 14 May 2012.

B FACTUAL BACKGROUND

C [3] In 2001, Bank Islam extended an 'Al-Bai Bithaman Ajil' Islamic financing facility ('BBA facility') to Khalid. The terms of the BBA facility are expressly stated in Bank Islam's letter of offer dated 17 April 2001, a master revolving BBA agreement dated 30 April 2001, a memorandum of charge of shares, a fund administration and custodian agreement and an asset purchase agreement dated 30 April 2001 (collectively, 'the BBA facility agreements').

D [4] On 10 May 2007, Khalid instituted a High Court suit against Bank Islam ('Khalid's suit') seeking, inter alia, declarations that:

- E (a) under the Islamic Banking Act 1983, the BBA facility agreements were agreements which Bank Islam was not licensed to offer and/or enter into; and
- (b) the BBA facility was not in accordance with the religion of Islam and hence Bank Islam was in breach of its licence issued under s 3 of the Islamic Banking Act 1983.

F [5] On 24 May 2007, Bank Islam filed a separate High Court suit ('Bank Islam's suit') against Khalid for breaches of the terms of the BBA facility, seeking recovery of monies due and owing from Khalid.

G [6] Khalid's suit and Bank Islam's suit were consolidated ('the consolidate suits') vide order of court dated 15 May 2008, with Khalid as the plaintiff, and Bank Islam as the defendant in the consolidate suits.

H [7] On 13 June 2011, Bank Islam made the application to the High Court to refer to the SAC for its ruling on Shariah questions arising in the consolidate suits.

[8] Khalid objected on the ground, inter alia, that ss 56 and 57 were unconstitutional.

I [9] On 13 July 2011, pursuant to s 84 of the Courts of Judicature Act 1964, the High Court referred the question concerning the constitutionality of ss 56 and 57 to the Federal Court for its determination, but the Federal Court declined to do so because the High Court has yet to make a ruling on whether

there existed any Shariah question in the consolidate suits. The Federal Court then remitted the matter to the High Court.

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[10] On 18 November 2011, Zawawi Salleh J heard the application. On 1 December 2011, he held that there were Shariah questions which he identified and referred to the SAC for its ruling.

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[11] Thereafter, Khalid lodged the instant appeal.

PREVIOUS 'REFERENCE': *FUNCTUS OFFICIO*

C

[12] Learned counsel Mr Malik Imtiaz Sarwar (Ms Asma Mohd Yunus and Mr Azinuddin Karim with him) argued for Khalid that Zawawi Salleh J had failed to appreciate that the court's power to refer the Shariah questions was 'spent' or the High Court was *functus officio* in view of a previous 'reference' by Rohana Yusuf J in *Tan Sri Abdul Khalid bin Ibrahim v Bank Islam (M) Bhd and another suit* [2009] 6 MLJ 416 (HC) ('Rohana J's judgment') under s 16B of the (then) Central Bank of Malaysia Act 1958 ('the (then) 1958 Act').

D

[13] Bank Islam's learned counsel, Mr Tommy Thomas (assisted by Mr Ganesan Nethi) asserted that, in fact, Zawawi Salleh J had correctly appreciated that the so-called previous 'reference' made by Rohana Yusuf J to the SAC pursuant to s 16B of the (then) 1958 Act was a request to the SAC to ascertain if there was any existing ruling by the SAC in respect of 'Bai Bithaman Ajil Islamic financing contracts' ('BBA contracts'). It was not a reference to the SAC for a ruling on a Shariah question.

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[14] The essence of the question raised in the aforesaid submissions may be formulated as follows:

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Upon a proper perusal of Rohana J's judgment, was the High Court *functus officio* and hence the power of the High Court to make a reference to the SAC was 'spent' in view of a previous 'reference'?

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[15] Upon a careful reading of Rohana J's judgment, we have no difficulty in holding that the so-called previous 'reference' under s 16B of the (then) 1958 Act was merely a request for information as to whether there was any existing ruling by the SAC pertaining to BBA contracts. At p 426 A–B thereof, Rohana Yusuf J has rightly said, 'I had caused an enquiry to be made to the SAC as to whether a ruling has been made on the status of the BBA agreement.' That being the case, it is abundantly clear to us that there was no reference whatsoever to the SAC for a ruling on Shariah questions. The SAC was not asked to answer any specific question.

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- A [16] In the circumstances, we find no error on the part of Zawawi Salleh J in classifying the request as an enquiry to be made to the SAC as to whether a ruling has been made on the status of the BBA agreement. It is certainly not a reference to the SAC for its determination on a specific Shariah question. As there was no previous reference to the SAC for a ruling, the High Court could not be said to be *functus officio* or to have ‘spent’ the power to make a reference. Zawawi Salleh J is able to make the reference which has now become the subject matter of the instant appeal. Our answer to the above question is therefore in the negative.
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C CONSTITUTIONALITY OF SS 56 and 57

- D [17] Khalid’s second point was that Zawawi Salleh J erred in failing to appreciate that ss 56 and 57 are unconstitutional, being in contravention of Part IX and arts 8 and 74 of the Federal Constitution, in that the SAC is ‘usurping’ the functions of the courts in ascertaining Islamic law. (A reference hereinafter to a Part and an article is a reference to that Part and article in the Federal Constitution).

- E [18] In response, Bank Islam relied on art 74(1), Part IX and art 121 to support the contention that ss 56 and 57 are constitutional.

- F [19] These submissions touching on the constitutionality or otherwise of ss 56 and 57 attract the application of the principles of constitutional interpretation. I have the privilege of embarking on a discussion of these principles in eg *Public Prosecutor v Mohd Noor Bin Jaafar* [2005] 6 MLJ 745 (HC); *Dato’ Hari Menon @ Dato’ T Puraharan all CP Ramakrishnan (Suing as Legal Representative of DYMM Tuanku Jaafar Ibni Almarhum Tuanku Abdul Rahman, Yang DiPertuan Besar Negeri Sembilan Darul Khusus) v Texas Encore LLC & Ors* [2005] 4 MLJ 506 (HC); and *Pantai Bayu Emas Sdn Bhd & Ors v Southern Bank Bhd* [2008] 6 MLJ 649 (CA). Other authorities which incorporated these principles include *Dato’ Menteri Othman bin Baginda & Anor v Dato’ Ombi Syed Alwi bin Syed Idrus* [1981] 1 MLJ 29 (FC); *Faridah Begum bte Abdullah v Sultan Haji Ahmad Shah Al Mustain Billah Ibni Almarhum Sultan Abu Bakar Ri’ayatuddin Al Mu’adzam Shah* [1996] 1 MLJ 617 (SC); and *Sukma Darmawan Sasmitat Madja v Ketua Pengarah Penjara Malaysia & Anor* [1999] 1 MLJ 266 (CA). As these principles have been succinctly stated therein, we respectfully adopt and apply them in our interpretation of the aforesaid provisions of the Federal Constitution.
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- I [20] We take the view that the constitutionality of ss 56 and 57 is to be tested by reference to the legislative powers of Parliament to enact these sections. Article 74(1) empowers Parliament to make laws with respect to any of the matters enumerated in the Federal List (List 1), or the Concurrent List (List 3),

of the Ninth Schedule to the Federal Constitution. Item 4(k) of List 1 clearly provides that Parliament is empowered to make laws in respect of: **A**

4. Civil and criminal law and procedure and the administration of justice, including

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...

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(k) ascertainment of Islamic law and other personal laws for purposes of federal law

[21] Banking is a matter within the Federal List and the Islamic Banking Act 1983 as well as the Central Bank of Malaysia Act 2009 are clearly federal laws. Thus, ss 56 and 57 are within Parliament's power to enact. (I am grateful to my learned sister Zaharah bt Ibrahim JCA for her suggestion to include this paragraph as an integral part of our judgment herein). **C**

[22] Sections 56 and 57 are applicable without discrimination to all parties who are in the same circumstances and so cannot be said to have contravened art 8 governing fundamental liberties generally and equality before the law as well as equal protection of the law specifically. **D**

[23] On the issue as to whether there is any usurpation by the SAC of the powers and jurisdiction of the courts, we need only to examine Part IX which provides for the Judiciary and the functions, powers and jurisdiction of the courts. Under this Part, art 121(1) vests the judicial powers of the Federation in the courts in such manner as may be conferred by or under federal law. So long as Parliament in its wisdom enacts laws for this subject matter, our courts shall be competent to perform the functions, or to exercise the powers and jurisdiction conferred thereunder. **E**

[24] Next, the statutory duty and function of the SAC is to ascertain Islamic financial matters or business only. It does not hear evidence nor decide cases. Sections 56 and 57 merit reproduction as follows: **G**

56. Reference to Shariah Advisory Council for ruling from court or arbitrator

- (1) Where in any proceedings relating to Islamic financial business before any court or arbitrator any question arises concerning a Shariah matter, the court or the arbitrator, as the case may be shall **H**
- (a) take into consideration any published rulings of the Shariah Advisory Council; or
 - (b) refer such question to the Shariah Advisory Council for its ruling. **I**
- (2) Any request for advice or a ruling of the Shariah Advisory Council under this Act or any other law shall be submitted to the secretariat.

A 57. Effect of Shariah rulings

Any ruling made by the Shariah Advisory Council pursuant to a reference made under this Part shall be binding on the Islamic financial institutions under Section 55 and the court or arbitrator making a reference under Section 56.

B

[25] Sections 56 and 57 contain clear and unambiguous provisions to the effect that whenever there is any Shariah question arising in any proceedings relating to Islamic financial business before eg any court, it is mandatory for the court to invoke s 56 and refer it to the SAC, a statutory expert, for a ruling. The duty of the SAC is confined exclusively to the ascertainment of the Islamic Law on financial matters or business. The judicial function is within the domain of the court ie to decide on the issues which the parties have pleaded. The fact that the court is bound by the ruling of the SAC under s 57 does not detract from the judicial functions and duties of the court in providing a resolution to the dispute(s) which the parties have submitted to the jurisdiction of the court. In applying the SAC ruling to the particular facts of the case before the court, the judicial functions of the court to hear and determine a dispute remain inviolate. The SAC, like any other expert, does not perform any judicial function in the determination of the ultimate outcome of the litigation before the court, and so cannot be said to usurp the judicial functions of the court. Hence, ss 56–57 are valid and constitutional.

DO SS 56–57 HAVE RETROSPECTIVE EFFECT?

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[26] Khalid's third and final point is that the learned judge had erred in holding that ss 56 and 57 have retrospective effect.

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[27] Bank Islam responded that no error was occasioned by the High Court.

[28] The question here is whether ss 56 and 57 have retrospective effect.

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[29] In our view, ss 56 and 57 would not and cannot have retrospective effect if there has been a deprivation of Khalid's pre-existing rights. However, there is no such deprivation in the instant appeal; ss 56 and 57 merely introduce and apply a procedure as far as Shariah questions are concerned. Under the (then) 1958 Act, which was in force until 24 November 2009, the SAC's statutory duties and powers to make rulings as a statute-appointed expert, by ascertaining Islamic Law for the purpose of Islamic financial matters or business on Shariah questions, were already in existence. The word used in the (then) s 16B was 'may'. With effect from 25 November 2009, the discretionary power of the court (to refer any Shariah question to the SAC when such a question is before the court) was amended to make the reference mandatory,

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and consequently the SAC's ruling made pursuant to a reference is now binding on the court by virtue of the word 'shall' expressly enacted in ss 56 and 57

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[30] In the circumstances, we hold that Zawawi Salleh J is correct in taking the position that ss 56 and 57 have retrospective effect.

B

[31] As a matter of fact, the aforesaid three grounds have actually been ventilated and dealt with by Zawawi Salleh J in *Mohd Alias bin Ibrahim v RHB Bank Bhd & Anor* [2011] 3 MLJ 26 (HC), wherein the learned judge had also correctly stated the law. We hereby affirm his well-considered grounds expressed therein.

C

CONCLUSION

[32] It is plain to us that Khalid's appeal is devoid of merits. We dismiss this appeal with costs in the cause as agreed by the parties herein. Deposit to be refunded to Khalid as the appellant.

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Appeal dismissed with costs.

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Reported by Ashok Kumar

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